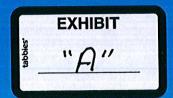
RATE AND/OR SERVICE - IT MAY NOT DUTY OF RAILROADS TO PROVIDE A BE AS SIMPLE AS YOU THINK

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Peter A. Pfohl Slover & Loftus LLP



OVERVIEW

OVERVIEW OF RAILROAD COMMON CARRIER OBLIGATION

CURRENT STATUTORY BASIS/ AREAS OF COVERAGE GENERAL APPLICATION OF THE OBLIGATION IN PRACTICE

I. OVERVIEW OF COMMON CARRIER OBLIGATION

- Historical Basis: an ancient legal doctrine, traced back to English common law and beyond
- although "if his coach be full" he was not liable for failing to transport more Common law mandated carriers "to receive all goods and passengers" than he could carry. Pennsylvania R.R. Co. v. Puritan Coal Mining Co., 237 U.S. 121 (1915)
- Part of U.S. legal doctrine for well over 125 years
- regard to the provision of common carrier service because Railroads have a "higher standard of responsibility" with of the carriers' "quasi-public nature." G.S. Roofing Products Co. v. STB, 143 F.3d 387 (8th Cir. 1997)
- generally, a common carrier railroad's rates, practices, and services must Railroad right of way in many respects akin to public highways, and be reasonable

II. CURRENT STATUTORY BASIS

Common carrier obligation is now statutory and obligation even broader than at common law

- Obligation added to the Interstate Commerce Act in 1906
- Transportation Act of 1920 subsequently "imposed an affirmative duty on the [ICC] to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States." R.R. Comm'n of Wisc. v. Chicago, B&O R.R. Co., 257 U.S. 563 (1922)
- Currently embodied primarily in 49 U.S.C. §11101(a) (rail carriers providing common carrier transportation "sha provide the transportation or service on reasonable request"
- Generally, applicable to non-contract, non-exempt traffic
- See, e.g., 49 U.S.C. § 10709(b) (only duties in connection with service provided under contract are those specified by the terms of the contract)

II. CURRENT STATUTORY BASIS (continued)

The Surface Transportation Board (STB) has authority to requiate a railroad's common carrier activities in various respects:

- Rates: Carrier has duty to provide rates for service to any person, on reasonable request, and rates for captive customers "must be reasonable" 49 U.S.C. §10701(d)(1)
- shall establish reasonable . . . rules and practices related to that transportation or service" 49 U.S.C. §10702 Practices: "A rail carrier providing [common carrier rail service]
- If STB finds that a practice is unreasonable, it can order the railroad to desist and to adopt a reasonable practice 49 U.S.C. §10704
- **Service:** Generally, common carrier obligation includes duty to provide adequate track and other service equipment and facilities, and to provide service "with reasonable dispatch"
- carrier obligation is generally to apportion capacity reasonably among shippers requesting service In times of temporary emergency/shortage of capacity, the common

III. APPLICATION OF THE OBLIGATION IN PRACTICE

- The STB has implemented rules of general applicability with respect to the common carrier obligation when warranted
- unreasonable practice for railroads to compute fuel surcharges as a percentage of existing rates, and ordered carriers to change E.g., STB in Ex Parte No. 661 determined that it was an
- region of the United States, or that a rail carrier . . . cannot transport have substantial adverse effects on shippers, or on rail service in a (emergency service orders are authorized for a period of up to 270 the traffic offered to it in a manner that properly serves the public") operate over the tracks of another, pursuant to 49 U.S.C. § 11123 days where emergency conditions exist "of such magnitude as to E.g., with UP/SP post-merger service failures in late 1990s, STB issued emergency service orders, including allowing carriers to

III. OBLIGATION OF THE OBLIGATION IN PRACTICE (continued)

- often decided in the context of individual adjudications. However, common carrier obligation matters are most
- The essence of the doctrine is one of "reasonableness" determined on a case-by-case basis, under a fact-specific inquiry
- E.g., carriers "cannot lawfully make fulfilling their statutory obligations contingent upon whether they think it is 'worth it' to do so" See, e.g., Pejepscot Indus. Park, Inc. (STB Docket No. 33989)

Current hot issue: TIH movements

- of TIHs to (1) indemnify railroad for all liability in excess of \$500 million STB Ex Parte No. 677 (Sub-No. 1): AAR proposed STB issue a policy statement that it would be reasonable for railroads to require shippers and (2) require shippers to carry insurance at levels required by
- STB Finance Docket No. 35219 (June 2009): STB grants petition for declaratory order by shipper that UP has an obligation to quote common carrier rates and provide service for TIH movements.
- Issue could ultimately be resolved through legislation, and railroads have sought relief from Congress

III. OBLIGATION OF THE OBLIGATION IN PRACTICE (continued)

Possible current/future issues with respect to common carrier service obligation

- mitigation, etc.) on customers which customers are concerned are a means Carriers are increasingly seeking to impose various accessorial fees (e.g., surcharges, private railcar maintenance requirements, environmental of avoiding expenses and shifting costs
- Carriers are increasingly refusing to provide specific service standards (e.g., cycle times) for bulk commodity customers
- implementing service embargos for extended time periods. (Are carriers Prior to recent economic downturn, some carriers were increasingly motivated to preserve some level of shortfall in capacity and/or the curtailment of service as part of pricing strategy?)
- Carriers may seek to impose FRA inspection requirements on shippers
- Carriers may seek, as a precondition of service, to impose substantial destination rail infrastructure investment requirements exceeding reasonable historic requirements
- Carriers may seek to shift liability requirements on customers